No. 701

In the Supreme Court of the United States

October Term, 1955

CURTIS REED, SUPERINTENDENT OF THE DISTRICT OF COLUMBIA JAIL, APPELLANT

v.

CLARENCE B. GOVERT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

[redacted]

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BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

1. Appellee contends that this Court is without jurisdiction to hear this appeal under 28 U.S.C. 1252, which provides:

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States * * * holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States

or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

Appellee concedes that the District Court has held unconstitutional in a civil action[1] an act of the Congress. Her motion to dismiss is based solely on the ground that appellant, Superintendent of the District of Columbia Jail, is not an employee of the United States within the purview of the statute since he is an employee of the District of Columbia. Appellant is, however, clearly an employee of an agency of the United States, and in the context of this case, is also an agent of the United States directly. The direct appeal is therefore authorized by 28 U.S.C. 1252.

a. The District of Columbia, although a distinct municipal corporation,[2] is an agency of the United States. 28 U.S.C. 1252 speaks of a suit or proceeding "to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party." Considering the punctuation and the manifest purpose of the statute to afford the United States Govern-

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[1] A proceeding for a writ of habeas corpus has always been held by this Court to be civil in nature. *Ex parte Tom Tong*, 108 U.S. 556; *Kurtz* v. *Moffitt*, 115 U.S. 487; *Farnsworth* v. *Montana*, 129 U.S. 104, 113; *Cross* v. *Burke*, 146 U.S. 82, 88; *Ex parte Milligan*, 4 Wall. 2, 113.

[2] *Barnes* v. *District of Columbia*, 91 U.S. 540; *Metropolitan R. Co.* v. *District of Columbia*, 132 U.S. 1; *District of Columbia* v. *Woodbury*, 136 U.S. 450; *District of Columbia* v. *John R. Thompson Co., Inc.*, 346 U.S. 100.

ment as a whole an opportunity for prompt review of constitutional issues,[2] the phrase "employee thereof" as used in the statute must refer to an employee of an agency of the United States, as well as to an employee of the United States as such. And there can be no doubt that appellant is an employee of an agency of the United States.

In describing the relationship of the District of Columbia Government to the Government of the United States, this Court has consistently adverted to the agency concept implicit in every municipal corporation. In the *Metropolitan R. Co.* case, *supra*, p. 8, it said:

> All municipal governments are but *agencies* of the superior power of the State or govern-

[2] In construing the predecessor statute of August 24, 1937, c. 754, 50 Stat. 752, 28 U.S.C. (1940 ed.) 349a, this Court said, in *Fleming* v. *Rhodes*, 331 U.S. 100, 104, "The Congress intended prompt review of the constitutionality of federal acts." The Court quoted from H. Rep. No. 212 (75th Cong., 1st Sess.) p. 2, the following:

> The importance to the Nation of prompt determination by the court of last resort of disputed questions of the constitutionality of acts of Congress requires no comment.

And from S. Rep. No. 963 (75th Cong., 1st Sess.) pp. 3-4:

> The United States is not excluded by the principle thus stated, from drawing the judicial power to its proper assistance either as an original party, or as an intervenor, when in private litigation, decision of the constitutional question may affect the public at large, may be in respect of matters which by the Constitution are entrusted to the care of the Nation, and concerning which the Nation owes a duty to all the citizens of securing to them their common rights.

> ment by which they are constituted, and are invested with only such subordinate powers of local legislation and control as the superior legislature sees fit to confer upon them. The form of those *agencies* and the mode of appointing officials to execute them are matters of legislative discretion. [Emphasis added.]

In *District of Columbia* v. *Woodbury*, *supra*, p. 452, the Court, discussing the Board of Public Works of the District of Columbia, referred to the agency aspect of municipal corporations when it wrote:

> * * * Although that Board was dependent upon both Congress and the Legislative Assembly of the District, and was the *hand and agent* both of the United States and of the District, it was held to be the representative and a part of the municipal corporation created by the act of 1871 * * *. [Emphasis added.]

And the recent discussion in *District of Columbia* v. *Thompson Co.*, *supra*, p. 109, makes it clear that the agency concept implicit in municipal corporations is applicable to the Government of the District of Columbia acting in behalf of the Government of the United States. Similarly, the Court in *Penn Bridge Co.* v. *United States*, 29 App. D. C. 452, 457 (1907), said:

> * * * The government of the District of Columbia is simply an agency of the United

> States for conducting the affairs of its government in the Federal District . . . .

"Congress, in exercise of its constitutional power under Article I, section 8, clause 17, over the seat of government of the United States, included the District of Columbia within the definition of "agency" in the Legislative Reorganization Act of 1949 (63 Stat. 203, 205).[4] Pursuant to the authority granted him under this Act, the President promulgated Reorganization Plan No. 5 of 1952, providing for the reorganization of the Government of the District of Columbia.[5] Under this plan the functions of the Board of Public Welfare, which had "complete and exclusive control and management" of the Washington Asylum and Jail,[6] together with the functions of the officers thereof, were transferred to the Board of Commissioners of the District of Columbia. Of the three Commissioners comprising the Board, two are appointed by the President with the advice and consent of the Senate[7] and one, the Engineer Commissioner, is appointed by the President from the ranks of the Corps of Engineers of the United States Army.[8] The Commissioners, authorized to delegate the functions assigned to them by the Reorganization Plan, issued District of Columbia

[4] 5 U.S.C. 133z to 133z-15.
[5] 3 C.F.R., 1952 Supp., p. 124.
[6] D.C. Code, 1951 ed. 3-406, 24-409.
[7] D.C. Code, 1951 ed. 1-201.
[8] D.C. Code, 1951 ed. 1-202, 203.

Reorganization Order No. 34, effective June 21, 1953, whereby a Department of Corrections under a Director was created and charged with responsibility for the maintenance of the District of Columbia Jail." Appellant, as superintendent of the jail, is responsible to the Director of the Department of Corrections and, through him, to the Commissioners. Inasmuch as the Commissioners are officers of the United States by virtue of Article II, section 2 of the Constitution, and the Department of Corrections, like the Board of Public Works in *District of Columbia* v. *Woodbury*, *supra*, is an agency of the United States, this proceeding against appellant, their employee, is within 28 U.S.C. 1252.

b. Appellant is also an agent of the United States diregtly. The functions of appellant as superintendent of the District of Columbia Jail mark him generally as an agent of the United States rather than of the District of Columbia alone.

Section 425 of Title 24 of the District of Columbia Code provides:

> All prisoners convicted in the District of Columbia for any offense, including violations of municipal regulations and ordinances and Acts of Congress in the nature of municipal regulations and ordinances, shall be committed, for their terms of imprisonment, and to such types of institutions as the court,

[1] See Reorganization Order No. 34, Appendix to Title 1 of Supp. III of D. C. Code, 1951 ed., p. 34.

> may direct, to the custody of the Attorney General of the United States or his authorized representative, who shall designate the places of confinements where the sentences of all persons shall be served. The Attorney General may designate any available, suitable, and appropriate institutions, whether maintained by the District of Columbia Government, the federal government, or otherwise, or whether within or without the District of Columbia. The Attorney General is also authorized to order the transfer of any such person from one institution to another if, in his judgment, it shall be for the well-being of the prisoner or relieve overcrowding or unhealthful conditions in the institution where such prisoner is confined, or for other reasons. [July 15, 1932, ch. 492, § 11, as added June 6, 1940, 54 Stat. 244, ch. 254, § 8.]

Inasmuch as "[c]rimes committed in the District are not crimes against the District, but against the United States" (*Metropolitan R. Co. v. District of Columbia*, 132 U.S. 1, 9), the foregoing section of the Code makes manifest that appellant derives his authority to detain prisoners from the Attorney General of the United States. Acting under instructions of the Attorney General in regard to the detention of prisoners, he is properly characterized an agent of the United States.[10]

[10] The duties imposed on appellant under D. C. Reorganization Order No. 34, *supra*, fn. 9, are principally concerned with

c. In the context of this case appellant is also an agent of the United States Air Force. Although appellant is authorized generally under 18 U.S.C. 4083 to accept prisoners convicted by courts-martial, in accepting custody of appellee he acted upon request of officers of the United States Air Force and made the facilities of the District of Columbia Jail available for her detention. The Air Force officers, in making their request of appellant, acted, under authority of Article 10, Uniform Code of Military Justice (50 U.S.C. 564), to obtain suitable quarters for confinement since no facilities for restraint of women were available on Air Force Bases in and around Washington. Hence, in detaining appellee, appellant, who normally derives authority to restrain prisoners from the Attorney General, acted as an agent for the Air Force.

Thus it is clear that appellant, as superintendent of the District of Columbia Jail, was, while custodian of appellee, an agent or employee of the United States within the ambit of 28 U.S.C. 1252 as interpreted in *Fleming* v. *Rhodes*, *supra*. This is so whether he is deemed an employee of the Commissioners of the District of Columbia, who are constitutional officers of the United States, or an agent of the Attorney General under whose authority he detains all prisoners committed to his custody, or an agent of the United States Air

the maintenance and care of the physical properties of the jail. Compare section 420 with section 421, both of Title 24, D. C. Code, 1951 ed.

Force officers who are authorized to invoke civilian custodial facilities if the occasion requires.

2. In her motion to affirm the judgment below, appellee contends that the decision in *Toth* v. *Quarles*, 350 U.S. 11, established that Congress does not have the constitutional power to subject any civilians to court-martial jurisdiction in time of peace, and, therefore, that a dependent wife who accompanies her husband to a foreign duty station under the auspices of the armed forces may not be tried by a court-martial for crimes committed in the foreign country.

This argument, however, glosses over the essential factual differences between this and the *Toth* case. Whereas in the *Toth* case, Toth had been honorably discharged from the Air Force and had resumed his normal role and occupation as a civilian at the time he was charged and arrested for the alleged murder, appellee, at the time she was charged and arrested, was still in England residing on an Air Force base under auspices of the United States Air Force. She had not at the time of her trial reverted to her status as a civilian within the jurisdiction of the United States courts. Moreover, the appellee misconceives (Motion, pp. 15-17) our argument regarding the fact that the alleged murder occurred in England under circumstances which would ordinarily make the crime triable there. Our point is not, of course, that an Act of the English Government could create for Congress powers it otherwise lacks. Rather, it is that for the exercise of

such ceded extra-territorial jurisdiction. Congress has power, as this Court's decisions show, to provide for trial by tribunals other than Article III courts without prescribing indictment and trial before a petit jury. *In re Ross*, 140 U. S. 453; *Neely* v. *Henkel*, 180 U. S. 109.

As noted in the Statement as to Jurisdiction, the issue presented affects the power of the United States to control the 250,000 American citizens residing in foreign nations as dependents of personnel in the United States armed forces stationed abroad. The issue is plainly an important one which should be fully developed before this Court.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the motion to dismiss this appeal for want of jurisdiction, or, in the alternative, to affirm for lack of a substantial question, should be denied.

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